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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 180

SUPERIOR BATH HOUSE COMPANY,

Appellant,

vs.

**Z. M. MCCARROLL, COMMISSIONER OF REVENUES FOR THE
STATE OF ARKANSAS.**

APPEAL FROM THE SUPREME COURT OF THE STATE OF ARKANSAS.

STATEMENT AS TO JURISDICTION.

✓
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SUPREME COURT OF THE UNITED STATES

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No. 180

SUPERIOR BATH HOUSE COMPANY,

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**Z. M. McCARROLL, COMMISSIONER OF REVENUES FOR THE
STATE OF ARKANSAS.**

STATEMENT AS TO JURISDICTION.

Appellant, in support of the jurisdiction of this Court to review the above entitled cause on appeal, respectfully states:

(A) This is an appeal from a judgment of the Supreme Court of Arkansas taken under the provisions of United States Code, Title 28, Section 344 (Judicial Code, Sec. 237), par. (a) and amendments, and involves the constitutionality and the validity of a statute of the State of Arkansas taxing the income of appellant derived solely from business conducted in and on the Hot Springs National Park Reservation in Garland County, Arkansas, where it had its only office and establishment. Appellant contended that the statute of Arkansas as construed and applied to its operations violated the equal protection accorded to it under

Amendment XIV to the Constitution of the United States; that it constituted the taking of its property without due process of law, in violation of Amendment V to the Constitution of the United States; and was repugnant to the laws of the United States enacted with respect to the Hot Springs National Park Reservation.

(B) Act No. 118 of the General Assembly of the State of Arkansas for the year 1929, known as the Income Tax Act, imposed a tax of 2% of the net income of corporations organized under the laws of the State "with respect to carrying on or doing business". This Act was amended by Act No. 220 of the General Assembly of the State of Arkansas for the year 1931, exempting domestic corporations organized for the purpose of doing business entirely outside of the State of Arkansas from the payment of general or special taxes (except tangible property tax) imposed upon corporations organized for the purpose of doing business within the State. Within the time prescribed by Act No. 118 of the Acts of Arkansas for 1929, appellant prepared and submitted a return for the year 1928, which was filed with the Commissioner of Revenues of the State of Arkansas, under which it claimed exemption by reason of its operations having been confined to the Hot Springs National Park, which return was accepted and acquiesced in until a demand of the Commissioner of Revenues for the filing of a return by appellant and the payment of tax over said period, on or about the 18th day of January, 1939.

The provisions of the Constitution and the Acts of Congress and of the General Assembly of the State of Arkansas fixing sovereign jurisdiction over appellant's operations are set forth as follows:

Amendment V, Constitution of the United States:

"No person shall * * * be deprived of life, liberty or property without due process of law; * * *"

Amendment XIV, Constitution of the United States:

"All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Act of Congress, April 20, 1832, 4 Stat. at L. 505, par. 3:

"The hot springs in said territory, together with four sections of land, including said springs, as near the center thereof as may be, shall be reserved to the future disposal of the United States and shall not be entered, located or appropriated for any other purpose whatever."

Act of Congress, December 16, 1878, c. 5, 20 Stat. 258:

"Provided, that all titles given or to be given by the United States shall explicitly exclude the right to the purchaser of the land, his heirs or assigns, from forever boring thereon for hot water; and the hot springs, with the reservation and mountain, are hereby dedicated to the United States and shall remain forever free from sale or alienation."

Act of Congress, March 3, 1891, c. 533, par. 5, 26 Stat. 844:

"The consent of the United States is hereby given for the taxation under the authority of the laws of the State of Arkansas applicable to the equal taxation of personal property in that State, as personal property, of all structures and other property in private ownership on the Hot Springs Reservation."

Act No. 30 of the General Assembly of the State of Arkansas, approved February 21, 1903:

"SECTION 1. That exclusive jurisdiction over that part of the Hot Springs Reservation known and de-

scribed as part of the Hot Springs mountain and whose limits are particularly described by the following boundary lines * * * all in Township 2 South, Range 19 West, in the County of Garland, State of Arkansas, being part of the permanent United States Hot Springs Reservation, is hereby ceded and granted to the United States of America, to be exercised so long as the same shall remain the property of the United States; provided, that this grant of jurisdiction shall not prevent the execution of any process of the State, civil or criminal, on any person who may be on such reservation or premises; provided, further, that the right to tax all structures and other property in private ownership on the Hot Springs Reservation accorded the State by the Act of Congress approved March 3, 1901" (1891) "is hereby reserved to the State of Arkansas."

Act of Congress, April 20, 1904, c. 1400, par. 1, 33 Stat. 187:

"The portion of the Hot Springs mountain reservation in the State of Arkansas situated and lying within boundaries defined as follows * * * all in Township 2 South, Range 19 West, in the County of Garland and State of Arkansas, being a part of the permanent United States Hot Springs Reservation, sole and exclusive jurisdiction over which was ceded to the United States by an act of the General Assembly of the State of Arkansas * * *, which cession is hereby accepted * * * shall be under the sole and exclusive jurisdiction of the United States * * * Provided that nothing in this act shall be so construed as to forbid the service within said boundary of any civil or criminal process of any court having jurisdiction in the State of Arkansas * * *. And provided, further, that this act shall not be so construed as to interfere with the right to tax all structures and other property in private ownership within the boundaries above described accorded to the State of Arkansas by section 5 of the Act of Congress approved March 3, 1891, entitled 'An Act to Regulate the Granting of Leases at Hot Springs, Arkansas, and for Other Purposes'."

Constitution of Arkansas (1874), Art. XVI, par. 5:

"All property subject to taxation shall be taxed according to its value (a), that value to be ascertained in such manner as the General Assembly shall direct, making the same equal and uniform throughout the State (b). No one species of property from which a tax may be collected shall be taxed higher than another species of property of equal value (c), provided the General Assembly shall have power from time to time to tax hawkers, peddlers (d), ferries, exhibitions and privileges (e), in such manner as may be deemed proper."

Act No. 118 of the General Assembly of Arkansas for 1929:

"An Act Providing for the Levying, Collecting and Paying of a Tax on Incomes."

Preamble; Section 3:

"WHEREAS, Agricultural and Industrial development is now being retarded because of a policy to secure practically all of the Revenue from an Ad valorem Tax, thus penalizing and discouraging ownership of property, while many who enjoy the benefits of Government and have large incomes, pay almost nothing to support the Government;

"* * *

"ARTICLE II—IMPOSITION OF TAX.

"SECTION 3. (a) On Individuals.—A tax is hereby imposed upon and with respect to the entire income of every resident, individual, trust or estate, which tax shall be levied, collected and paid annually upon such entire net income as herein computed, at the following rates, after deducting the exemptions provided in this Act; * * *

"(b) On Corporations.—Every corporation organized under the laws of this State shall pay annually an income tax *with respect to carrying on or doing busi-*

"ness" (italics ours) "equivalent to two (2%) per cent of the entire net income of such corporation as defined herein, received by such corporation during the income year; * * *

"(c) On Income of Arkansas property of Non-residents.—A like tax is hereby imposed * * * with respect to the entire net income * * * *from all property owned,*" (italics ours) "and from every business, trade or occupation carried on in this state by individuals, corporations, partnership, trusts or estates, not residents of the State of Arkansas."

(C) This case was decided by the Supreme Court of Arkansas on the 1st day of April, 1940 (R. —) and petition for rehearing was entertained and overruled on the 13th day of May, 1940 (R. —). The Supreme Court judgment then becoming final, this application for appeal was presented to the Chief Justice of the Supreme Court of Arkansas on the 22nd day of May, 1940 (R. —).

(D) Appellant, Superior Bath House Company, filed its complaint in the Pulaski Chancery Court against Z. M. McCarroll, Commissioner of Revenues for the State of Arkansas, asking for an injunction restraining him from attempting to levy on and sell its property on the Hot Springs National Park Reservation in Garland County, Arkansas, for income tax for the years 1928 to 1938, inclusive, alleged to be due from the operation of a bath house conducted by appellant on said Reservation, where it maintained its office and only place of business. Appellant resisted the payment of the tax which the Commissioner claimed to have accrued since the passage of the Arkansas Income Tax Act in 1929; it being retroactive to embrace the year 1928, on the ground that (a) its sole operation, its only place of business and office was on the Hot Springs National Park Reservation, over which area the State of Arkansas had ceded exclusive jurisdiction to the United

States of America, reserving only the right to tax as personal property, all structures and other property in private ownership within the area, and that the attempted collection of the tax under Act No. 118 of the General Assembly of the State of Arkansas for the year 1929, as amended by Act No. 220 of the Acts of Arkansas for 1931, so far as such income was concerned violated the statutes of the United States and was repugnant to the laws of the United States applicable to the Hot Springs National Park Reservation, and the construction placed on said Acts by the courts of the United States; (b) that Act No. 220 of the Acts of Arkansas for 1931, in exempting corporations from the payment of income tax derived from operations conducted beyond the sovereignty of Arkansas, and the denial to appellant of a like immunity on its income derived solely from operations on the Hot Springs National Park Reservation, over which area the State of Arkansas had ceded and the United States had accepted sole and exclusive sovereign jurisdiction, with the exception of the right accorded the State of Arkansas of "taxation under the authority of the laws of the State of Arkansas applicable to the equal taxation of personal property in that State as personal property, of all structures and other property in private ownership on the Hot Springs Reservation," constituted a denial to appellant of the equal protection accorded it under Amendment XIV to the Constitution of the United States, and was in violation of the prohibition contained in said Amendment; (c) that the action of the Commissioner in threatening to levy on and sell its property located on the United States Government Reservation for income tax alleged to be due on the operations aforesaid did constitute the taking of its property without due process of law, in violation of Amendment V to the Constitution of the United States, and was in violation of the prohibition contained in said Amendment.

The defendant filed a special demurrer to the complaint, and the Chancery Court on the 9th day of February, 1940, decreed that the tax for the years 1929 to 1935, inclusive, was barred by the Arkansas statute of limitations; that the tax for the years 1936 to 1938 was not barred and was collectible. The plaintiff and the defendant each appealed (R. —).

The appeals were duly lodged in the Supreme Court of Arkansas, which is the highest State Court, and it sustained the action of the lower court in holding that the tax for the years 1936 to 1938 on appellant's operations was collectible. It reversed the decree of the lower court and by its judgment held that the tax for the years 1929 to 1935, inclusive, was not barred by the statute of limitations of Arkansas; that Arkansas was not prohibited under the terms of the cession and acceptance Acts relating to the area of appellant's operations from collecting income tax for business conducted within the area; and remanded the cause for the entry of a purely ministerial order dismissing the complaint of the appellant in its entirety.

Petition for rehearing was denied on the 13th day of May, 1940. In its brief to the Supreme Court of Arkansas, appellant set up its claim that the Act and the collection thereunder was repugnant to the statutes of the United States; that it was repugnant and in violation of the compact entered into between the United States and the State of Arkansas respecting sovereignty and jurisdiction over the area involved; that the Arkansas Income Tax Act by its provisions, by the provisions of the Constitution of Arkansas, and under the decisions of the Supreme Court of Arkansas, was not a property tax within the meaning of the terms of the Act of Congress of March 3, 1891 (c. 533, par. 5, 26 Stat. 844); that the levy and collection thereof denied to the plaintiff the equal protection accorded it under Amend-

ment XIV to the Constitution of the United States, and the sale of its property under said levy would constitute the taking thereof without due process of law, in violation of Amendment V to the Constitution of the United States.

To sustain the jurisdiction of this Court and to reverse this cause, appellant relies on the following cases:

Collins v. Yosemite Park & Curry Co., 304 U. S. 517;

Yellowstone Nat. Park Transportation Co. v. Gallatin County, 31 F. (2d) 644;

Ft. Leavenworth Railway Company v. Lowe, 114 U. S. 525;

Wachovia Bank & Tr. Co. v. Daughton, 272 U. S. 567;

James v. Dravø Contracting Co., 302 U. S. 134;

Arlington Hotel Co. v. Fant, 278 U. S. 439;

Williams v. Arlington Hotel Co., 22 F. (2d) 669;

Hot Springs Cases (Historical)—*Henry M. Rector v. U. S.*, 92 U. S. 698;

Hammond v. Whittridge, Trustee, 204 U. S. 538;

Ex parte Gaines, 56 Ark. 227;

Fant v. Arlington Hotel Co., 170 Ark. 440;

Arlington Hotel Co. v. Fant, 176 Ark. 613;

Surplus Trading Co. v. Cook, 281 U. S. 647;

Davies v. Hot Springs, 141 Ark. 521, 526;

Buckstaff Bath House Co. v. McKinley, Commr., etc.,
Oct. term 1939, No. 201, U. S. Sup. Ct., Dec. 18, 1939;

Stanley v. Gates, 179 Ark. 886 (Character Arkansas
Income Tax);

*McCarroll, Commr etc., v. Gregory-Robinson-Speas,
Inc.*, 198 Ark. 235;

Royster Guano Co. v. Virginia, 253 U. S. 412.

It is therefore respectfully submitted that this Court has jurisdiction to hear and determine this appeal.

TERRELL MARSHALL,

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Attorneys for Appellant.

EXHIBIT "A".

SUPERIOR BATH HOUSE COMPANY

v.

McCARROLL, Commissioner of Revenues

4-5959.

Opinion Delivered April 1, 1940.

Appeal from Pulaski-Chancery Court; Frank H. Dodge, Chancellor; affirmed on appeal; reversed on cross-appeal.

GRIFFIN SMITH, C. J.:

The suit from which this appeal proceeds was one to enjoin the commissioner of revenues from collecting taxes on incomes for 1928 to and including 1938.¹ A special demurrer was filed on behalf of the commissioner. The complaint was dismissed in respect to taxes for 1936, 1937, and 1938. As to collections sought to be enforced for other years mentioned in the complaint, it was held that by limitation the commissioner had lost his right of action.²

Appellant's income is derived from personal services and the use of property on Hot Springs Reservation, in Garland county.³ It is insisted that exclusive jurisdiction over the Reservation has been ceded to the United States, and that Arkansas reserved only the right to tax, under laws of the state applicable to equal taxation of personal property, the structures erected on leases and other personal property in private ownership.

There is the further contention that act 220 of the Arkansas general assembly, approved March 26, 1931, exempts from payment of the tax domestic corporations doing business entirely without the state, and that act 118 of 1929, "as applied to the appellant in this case, when read in con-

¹ Act 118, approved March 9, 1929.

² Section 26 of act 118, *supra*.

³ Act 30 of the General Assembly of Arkansas, approved February 21, 1903.

nection with act 220, constitutes an unconstitutional discrimination and classification against the appellant, and denies to it the equal protection accorded under the Fourteenth Amendment,⁴ . . . (and is violative of) Art. 2 Sec. 8, of the constitution of Arkansas."

Appellant avers that a return on its income for 1928 was filed in 1929 in a timely manner; that with the return it claimed exemption because operations productive of earnings were conducted under a lease from the Department of the Interior; that the commissioner's ruling was consonant with the claimed exemption, and that no further demand had been made until January, 1939.

By act of March 3, 1891, c. 533, Sec. 5, 26 Stat. 844, U. S. Code Annotated, Title 16, Sec. 365, consent of the United States was given "for the taxation, under the authority of the laws of the State of Arkansas applicable to the equal taxation of personal property in that state, as personal property of all structures and other property in private ownership on the Hot Springs National Park."

By act 30 of the Arkansas general assembly, approved February 21, 1903, exclusive jurisdiction over the Hot Springs Reservation was "ceded and granted" the United States, with the proviso, however, that the act should not prevent the execution of any process of the state, civil or criminal, on any person who may be on such reservation or premises; provided further, that the right to tax all structures and other property in private ownership on the Hot Springs Reservation accorded the state (by act of 1891) is hereby reserved to the state of Arkansas.

Subsequent to approval of act 30, *supra*, the Congress enacted that "All fugitives from justice taking refuge within (the boundaries of the reservation) shall, on due application to the executive of (Arkansas), whose warrant may lawfully run within said territory for said purpose,

⁴ "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

be subject to the laws which apply to fugitives from justice found in the state of Arkansas. Said section shall not be construed as to interfere with the right to tax all structures and other property in private ownership within the boundaries (described), accorded to the state of Arkansas by Sec. 365 of (Title 16, United States Code Annotated).'⁵

Buckstaff Bath House Company v. McKinley, Commissioner,⁶ upheld validity of the Arkansas unemployment compensation tax.⁷ It was there said that "The tax laid by act 155 is not a tax on personal property; nor is it, in any sense, a property tax."

*Pollock v. Farmers Loan & Trust Company*⁸ classifies a tax on the income from real and personal property as a direct tax on the property.

Stanley v. Gates, 179 Ark. 886, 19 S. W. 2d 1000, holds that the income tax imposed by the act of 1929 is not a property tax. Mr. Justice Hart (later Chief Justice) who wrote the opinion in the *Stanley-Gates Case*, said: "It has been well said that 'a tax on income is not a tax on property, and a tax on property does not embrace incomes.' Hence, a majority of the court holds that 'property', as the term is used in art. 16, Sec. 5 of the constitution, means the property itself as distinguished from the annual gain or revenue from it."

The *Buckstaff Bath House Case* was appealed to the Supreme Court of the United States and affirmed.⁹ Substance of the opinion, written by Mr. Justice Douglas, is that while the state tax for social security is an excise, it comes within the permission granted by congress to tax personal property on the Hot Springs Reservation. The holding is influenced by the social security act of congress, which the court thought gave Arkansas "implied authority" to levy the tax. Concurrence of Mr. Justice Read is on the ground

⁵ U. S. Code Annotated, Title 16, Sec. 372.

⁶ 198 Ark. 91, 127 S. W. 2d 802.

⁷ Act 155, approved February 26, 1937.

⁸ 158 U. S. 601, 617, and 635.

⁹ Supreme Court Reporter for January 1, 1940, Vol. 60, No. 4; Law Ed. Advanced Opinions, Vol. 84, No. 4.

that the act of congress of 1891 should be interpreted to give consent to the state to levy the excise for unemployment compensation.

We think there is authority in the general language of the act of 1891 for the state to extend to lessees of personal property on the reservation the tax assessed against all other citizens within the state. Although classified as an excise, our income tax is treated by the courts as having many of the characteristics of a property tax. An excise is not within our constitutional provisions limiting the rate of taxes on property and providing for uniformity.

It would be an anomolous situation indeed if we should say that an excise tax levied for unemployment against those coming within the law's classification included operations within the reservation when authority for its exaction came from a state statute as distinguished from congressional authority, but that a tax on incomes levied uniformly against all citizens could not extend to the reservation because the term "personal property" was used in the act of 1891.

We do not agree with appellant that the reservation, for purposes of taxation, is not within the state. If this theory were correct the Buckstaff Bath House Case was wrong, for act 155 of the Arkansas general assembly could have no extra-territorial effect.

The state is not estopped by action of the commissioner of revenues in 1929. It has often been held that the determination by an administrative agent of the state that an assessment made by law is not to be collected does not affect the right of enforcement. The latest decision directly in point is *Southwestern Distilled Products Company, Inc v. State, ex rel. Humphrey*, Vol. 72, No. 3, Law Reporter for January 29, 1940. The instant case is unlike *State, ex rel. Attorney General v. New York Life Insurance Company*,¹⁰ where Sec. 13899 of Pope's Digest was held to apply. There the insurance company had declared all premiums upon which a report was required.

¹⁰ 198 Ark. 820, 131 S. W. 2d 639.

In the case at bar appellant, in its report, urged its exemption, and when the commissioner (acting, of course, in good faith) concluded the petitioner was not subject to the tax, no report was made for any of the succeeding six years. Appellant is not subject to the tax for 1928, but will be required to pay for all unreported years.

The decree is affirmed on appeal, and reversed on cross-appeal. The cause is remanded for further proceedings under the law as here declared.

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